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NO. 50130-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DEPARTMENT OF LABOR & INDUSTRIES
OF THE STATE OF WASHINGTON,

Appellant,

v.

RONALD V. MA'AE,

Respondent.

REPLY BRIEF

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I. INTRODUCTION

To provide better care for injured workers, the Legislature established a network of qualified doctors. The Legislature made the network the exclusive source of care in Washington for injured workers, except for an initial office or emergency room visit, to implement the network. RCW 51.36.010(2)(b). Ma'ae asserts that when the Legislature created the network it did not intend to restrict access to the workers' compensation system. Brief of Respondent (RB) 10, 14, 24. The Legislature did not limit access to the system, but once the Department allows a claim, the Legislature limited access to particular providers. The Legislature facilitates initial access to the system by allowing a nonnetwork provider to fill out an application to open a claim. But once the Department allows the claim, the exclusivity mandate requires a worker to see a network provider.

Having a claim for workers' compensation benefits with the Department of Labor & Industries since 2007, Ma'ae has already accessed the system to receive benefits. For a reopening application, he, like all Washington workers, must see a network provider to fill out a reopening application—at no charge to him. WAC 296-14-400; WAC 296-20-097. Because he did not, the Department properly required him to see a network doctor before accepting his reopening application.

II. ARGUMENT

The Legislature implemented the provider network because "[i]njured workers deserve high quality medical care in accordance with current health care best practices." RCW 51.36.010(1). Workers located in Washington may receive care only from network providers under the statute unless it is at the beginning of the claim when a doctor completes an application for benefits or an emergency room visit:

> Once the provider network is established in the worker's geographic area, an injured worker may receive care from a nonnetwork provider only for an initial office or emergency room visit.

RCW 51.36.010(2)(b).

Under WAC 296-20-01002, an "initial visit" occurs when the worker first files the report of injury or occupational disease to request workers' compensation benefits:

> The first visit to a health care provider during which the Report of Industrial Injury or Occupational Disease is completed and the worker files a claim for workers' compensation.

Under these provisions, the exclusivity mandate applies when: (1) the visit is not an initial office visit or emergency room visit and (2) the visit is care or treatment under the statute. Here, because both requirements are met, the provider network laws required a network provider to complete Ma'ae's reopening application. RCW 51.36.010(2)(b); WAC 296-14-400.

A. A Reopening Examination Is Not an Initial Visit

1. The plain meaning of initial visit is a visit to fill out a report of injury at the claim's beginning

The plain meaning of "an initial office . . . visit" is defined by WAC 296-20-01002's definition of initial visit. It is the "first visit to a health care provider [where] the worker files a claim for workers' compensation." WAC 296-20-01002. It is when the worker and doctor complete the report of industrial injury or occupational disease. *Id.*

The Department may define statutory terms by rule. The court follows an agency's definition of an undefined statutory term where the agency administers the statutory provisions. *Phillips v. City of Seattle*, 111 Wn.2d 903, 908, 766 P.2d 1099 (1989). Ma'ae recognizes that the Department defined "initial visit" but says this definition does not apply because of the slight difference in wording between the statute and regulation: "initial office or emergency room visit" and "initial visit." RB 28. But the difference he points to does not prevent the court from applying the rule. The statute allows treatment by a nonnetwork provider in two contexts: an emergency room visit and an "initial office . . . visit." Visiting the doctor's office initially to file a claim is an "initial office . . . visit" under the statute and an "initial visit" under the rule. Because an initial office visit is plainly an initial visit, the rule's definition of initial

visit applies. It is true that an emergency room visit need not be an "initial visit," but because of the use of the word "initial" in "initial office . . . visit," any office visit by a nonnetwork provider must be an initial visit, making the rule's definition of "initial visit" determinative.

The Legislature knew of this rule definition and acquiesced to it when it enacted RCW 51.36.010(2)(b). In *Manor*, the Court held that the Legislature acquiesces to regulatory language when it does not change a statute after notice of the rule. *Manor v. Nestle Food Co.*, 131 Wn.2d 439, 445 n.2, 932 P.2d 628, *amended*, 945 P.2d 1119 (1997), *disapproved on different grounds by Wash. Indep. Tel. Ass'n v. Utils. & Transp. Comm'n*, 148 Wn.2d 887, 64 P.3d 606 (2003). WAC 296-20-01002's definitions are part of the medical aid rules adopted by the Department and are an important backdrop to the industrial insurance system. The Legislature did not create the provider network on a blank slate but instead relied upon the existing system when establishing the network.

Ma'ae incorrectly argues that the statute is ambiguous on what constitutes "an initial office or emergency room visit." RB 21. But the Department's definition follows the dictionary definition of the term. *See State v. Watson*, 146 Wn.2d 947, 954, 51 P.3d 66 (2002) (a court may use a dictionary to ascertain a term's ordinary meaning). "Initial" means "of or related to the beginning." *Webster's Third New Int'l Dictionary* 1163

(2002). Using a word meaning "beginning" shows that the Legislature limited care from a nonnetwork provider to the first time an injured worker seeks treatment for the industrial injury or occupational disease—the beginning of the claim.

2. The meaning of initial visit is not ambiguous but the Department's rules have resolved any ambiguity

Even if the statute were ambiguous, the Department's regulations resolve any ambiguity. When a statute is ambiguous, an agency has the authority to "'fill in the gaps'" through rulemaking. *Hama Hama Co. v. Shorelines Hr'gs Bd.*, 85 Wn.2d 441, 448, 536 P.2d 157 (1975). WAC 296-14-400 provides that only network providers can complete reopening applications, meaning a reopening examination is not an initial visit. WAC 296-20-015(2)(a)(i) confirms this reading, where the Department cross-referenced WAC 296-20-01002's definition of initial visit to detail when a nonnetwork provider could treat workers. As the rules reasonably follow the statute and statutory scheme, the Court should follow them. *See Green River Cmty. Coll., Dist. No. 10 v. Higher Ed. Pers. Bd.*, 95 Wn.2d 108, 112, 622 P.2d 826 (1980) (court upholds rules that are reasonably consistent with statutory scheme).

The Department has rulemaking authority to implement the Industrial Insurance Act, including the provider network. RCW

51.36.010(10); RCW 51.04.020(1), .030(1). This rulemaking authority allows the Department to adopt legislative rules that the Board and courts must follow. Ma'ae argues that under RCW 51.36.010(10), which provides "[t]he department may adopt rules related to this section," the Department only had authority to adopt interpretive rules since the statute uses the permissive "may" to adopt rules. RB 15. That the Department has the option to adopt rules does not change that the Legislature authorized it to adopt rules, and the courts follow a duly authorized rule. *See Mills v. W. Wash. Univ.*, 170 Wn.2d 903, 910, 246 P.3d 1254 (2011).

Agencies may adopt legislative rules, which include mandatory rules implementing legislative programs. RCW 34.05.328(5)(c)(iii). Ma'ae cites *Association of Washington Business v. Department of Revenue*, 155 Wn.2d 430, 434 n.2, 120 P.3d 46 (2005), and the definition of interpretative rule for the proposition that WAC 296-14-400 is an interpretative rule because it allegedly subjects no person to penalty or sanction. AB 18. It is RCW 34.05.328(5)(c)(iii) that defines legislative rule:

> A "significant legislative rule" is a rule other than a procedural or interpretive rule that (A) adopts substantive provisions of law pursuant to delegated legislative authority, the violation of which subjects a violator of such rule to a penalty or sanction; (B) establishes, alters, or revokes any qualification or standard for the issuance, suspension, or revocation of a license or permit; or (C)

> adopts a new, or makes significant amendments to, a policy or regulatory program.

WAC 296-14-400 qualifies as a legislative rule in two respects. First, it sanctions nonnetwork doctors in the form of nonpayment for their unpermitted services, as the Department will not pay a nonnetwork provider to complete a reopening application. *See also* WAC 296-20-015. And, second, RCW 34.05.328(5)(c)(iii)(C) defines "legislative rule" as including a rule that "adopts a new, or makes significant amendments to, a policy or regulatory program." The provider network is certainly a new policy or regulatory program, as is the amendment to WAC 296-14-400.

When construing an ambiguous statute, the touchstone is to further legislative intent. *Rozner v. City of Bellevue*, 116 Wn.2d 342, 347, 804 P.2d 24 (1991) (when construing an ambiguous statute, "the interpretation adopted should always be one which best advances the legislative purpose."). The Department's rules further the Legislature's intent by implementing the exclusivity mandate of RCW 51.36.010, which provides the best care to workers. These rules liberally construe the statute, as required by RCW 51.12.010: "[t]his title shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment." For treating injured workers, the Legislature stated how to reduce

suffering and economic loss. "The legislature finds that high quality medical treatment and adherence to occupational health best practices can prevent disability and reduce loss of family income for workers, and lower labor and insurance costs for employers." RCW 51.36.010(1). So an interpretation that promotes using highly qualified doctors who adhere to occupational best practices furthers the liberal construction of the statute.

Ma'ae sought the opinion of an unqualified doctor who was declined admission to the network and who then withdrew his application. CP 161. It does not benefit workers such as Ma'ae to allow a nonnetwork provider such as Dr. Johnson to provide a medical opinion because it does not benefit workers to allow doctors who fail to meet the network's minimum standards to render medical judgments about injured workers. Ma'ae may see an admitted network provider at no cost to complete a reopening application. WAC 296-20-097.

3. Ma'ae's arguments about the meaning of initial visit lack merit

Ignoring the Department's rules, Ma'ae appears to posit that the statute's use of "injured worker" in RCW 51.36.010(2)(b) means that an initial visit includes a reopening application visit because only in an allowed claim can someone be an injured worker. *See* RB 22. But the mere inclusion of the phrase "injured worker" does not show that the

Legislature intended for its limitation on treatment to apply only after the Department has already allowed the claim. Rather, the Legislature allows a nonnetwork provider to see the worker for an initial visit to fill out an application for benefits, which necessarily occurs before the Department allows the claim. Once the Department has allowed the claim, the worker must see a network provider for all but emergency room treatment.

It makes sense for the Legislature to distinguish between treatment in claims before and after claim allowance, as workers with new claims may not know about the provider network. It makes sense to let those new to the workers' compensation system go to their family doctor who may or may not be a network member in an initial visit but to require the worker to see only network providers once the Department allows the claim.

Ma'ae also claims that a reopening examination visit should be an initial visit because sometimes it is difficult to tell if a condition is a new injury or an aggravated old injury. RB 25. He points out that it can take time to determine if something is an aggravation or a new injury and is concerned about the medical bills during this time and whether the worker will be out of pocket for 1) the initial visit that turned into an aggravation visit and 2) the treatment from the time the worker originally applied for benefits for the new injury and the time the worker reapplies for an aggravation using a network provider. RB 25-26.

His concerns are misplaced. First, the worker would not be out of pocket for the initial visit that turned into an aggravation visit. In the unlikely event that the Department sought to recoup the money already paid to the provider for the initial visit, the doctor could not pass that charge on to the worker. A nonnetwork provider who treats an injured worker for anything other than an initial visit cannot bill the injured worker for that treatment. *See* WAC 296-20-015, -020, -022. Second, were the worker undergoing months of doctors' visits between the initial visit and the aggravation examination visit, the worker would have a network provider because a nonnetwork provider may only see the worker in the initial visit unless the visit is in the emergency room. RCW 51.36.010(2)(b). If it turns out that there is not a new injury but an aggravation of an old injury, the treating doctor will be a network provider with no issue as to payment of a nonnetwork provider. In any event, the issue of what benefits are available after the filing of an industrial injury claim that turns into an aggravation claim is well beyond the scope of the issue here, which solely concerns the sufficiency of Ma'ae's aggravation application.

In another argument, Ma'ae points out that the Department defined "emergency room visit" to include an immediate hospitalization that follows the emergency room visit. WAC 296-20-015; RB 26. But this says

nothing about the Department's authority to define initial visit as excluding a reopening examination visit. Unlike an immediate hospitalization, which flows from the emergency room visit, a reopening examination visit occurs often years after the initial visit to fill out the application for benefits. The situations are not comparable.

Ma'ae decries that emergency room doctors and out-of-state doctors can fill out reopening applications, but this was the Legislature's choice in enacting a statute that covers an emergency room visit and also sets a geographical area for the network—Washington. AB 26-27; RCW 51.36.010(2)(b); WAC 296-20-01010; WAC 296-20-015.

Finally, Ma'ae argues that the Legislature would have had to amend the reopening statute, RCW 51.32.160, to regulate which doctors may file reopening applications. RB 27. The Legislature did not need to amend individual statutes, such as RCW 51.32.160, to carry out the broader scheme of the provider network once the Legislature defined who might serve as a medical provider in the workers' compensation system. Definitional terms govern throughout a statutory scheme if the context compels this, as it does here. *See AllianceOne Receivables Mgmt., Inc. v. Lewis*, 180 Wn.2d 389, 396, 325 P.3d 904 (2014).

The Industrial Insurance Act refers to multiple situations requiring medical evidence and requires no reference to the network for each

mention. *E.g.*, RCW 51.32.090(4)(b) (physician certifies when a worker can perform work); RCW 51.32.095(6) (attending physician verifies need for job modifications); RCW 51.32.099(2)(c) (provider documents physical restrictions to determine need for vocational services).[1] The Legislature intended the provider network laws to apply throughout the Industrial Insurance Act. Any other interpretation would undermine the Legislature's exclusivity mandate.

B. A Doctor Performing a Reopening Exam Treats or Cares for a Worker

For the exclusivity mandate to apply, a doctor must provide treatment or care to a worker. This occurred here. Ma'ae argues that Dr. Johnson, who provided a one-time examination to complete a reopening application, did not provide treatment. *See* RB 23.[2] But the fact that Dr. Johnson only saw Ma'ae to examine him for reopening does not mean he did not provide treatment. To aid in the reopening process, a provider physically examines the worker and performs a comprehensive medical

[1] *See also* WAC 296-20-01002 (provider certifies that a worker cannot work under definition of temporary partial disability); WAC 296-20-06101 (provider must file medical reports).

[2] Ma'ae seems to imply that a physician subject to the network must be an attending physician. RB 23. Not so. A treating provider does not have to be an attending physician to be subject to the network. All providers are required to follow network rules. RCW 51.36.010; WAC 296-20-015. And there are many other providers besides an attending physician. WAC 296-20-01010 (scope of network); WAC 296-20-01002 (definition of treating provider).

assessment to determine whether the worker's condition has objectively worsened. The provider:

- obtains a detailed history from the patient to understand the previous injury (CP 157),
- determines whether the worker sustained any new injuries or illnesses (CP 157),
- performs a physical exam (CP 157),
- diagnoses the worker's condition (CP 157),
- recommends a treatment plan (CP 157), and
- assesses whether the worker's physical findings show objective worsening of the industrial injury or occupational disease since claim closure (CP 157).

This is treatment of a worker, and the Court should defer to the Department's expertise in this regard. The court gives substantial judicial deference to agency views "when an agency determination is based heavily on factual matters, especially factual matters which are complex, technical, and close to the heart of the agency's expertise." *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 396, 932 P.2d 139 (1997). The Board thought it was not treatment, but the Court defers to the Department when the Department and the Board conflict in their interpretations "because the department is the executive agency that is charged with administering the statute." *Dep't of Labor & Indus. v. Slaugh*, 177 Wn. App. 439, 452, 312 P.3d 676 (2013).

The Legislature also recognized that medical-legal tasks such as completing workers' compensation applications fall within the definition

of care or treatment. Under RCW 51.36.010(2)(b), care of a worker includes an initial visit to fill out a report of injury to apply for workers' compensation benefits. RCW 51.36.010(2)(b); WAC 296-20-01002. The Legislature recognizes that a doctor may provide care through examination and documentation for application purposes. Similarly, examining a worker to document worsening in a reopening application is care or treatment.

Although a reopening examination and an examination to open an industrial insurance claim after an accident have many differences, they share one commonality: they both constitute treatment. RCW 51.36.010(2)(b). Effectively conceding this point about treatment, Ma'ae argues that the only difference between a visit to fill out an application for benefits and a visit to fill out a reopening application is that the doctor filling out the reopening application must "opine that the worker's causally related condition has worsened since the claim closed." RB 21.[3] This is not the only difference. A reopening application occurs often after years of treatment in an allowed workers' compensation claim.

[3] Ma'ae cites a Board decision for the proposition that the Board construes an application for benefits as a reopening application but this decision predates the network and to the extent it conflicts with WAC 296-14-400, it no longer has any persuasive effect. *John Svicarovich*, No. 08205, 1957 WL 53074 (Wash. Bd. Indus. Ins. Appeals April 22, 1957); RB 25.

The Legislature contemplated only two treatment situations that do not require a network provider: an initial visit to fill out an accident report to open a workers' compensation claim and an emergency room visit. All other treatment situations, such as performing a reopening examination, require a network provider.

C. Ma'ae Did Not Provide Medical Substantiation of His Claim

The Department correctly rejected Ma'ae's reopening application because Ma'ae did not provide medical substantiation of his condition when he did not provide an application by a network provider as required by WAC 296-14-400. Ma'ae recognizes that he must provide medical substantiation to support his claim. RB 31. *Donati v. Department of Labor & Industries*, 35 Wn.2d 151, 211 P.2d 503 (1949), notes that workers must provide a written reopening application that gives the Department information regarding the reasoning for reopening. Since this 1949 case, the Department has adopted additional requirements consistent with its rulemaking authority. RCW 51.04.020(1); RCW 51.36.010(10). These requirements include medical information from a network provider. If WAC 296-14-400 is a valid rule, which it is, only a network provider may complete the application. The Department properly rejected Ma'ae's application when he did not submit an application to reopen completed by a network provider.

Because Ma'ae should not prevail, the Court should reject his request for attorney fees. RCW 51.52.130; RB 32.

III. CONCLUSION

A reopening application visit is not an initial visit to file a claim. It is treatment of a worker because it requires examination and medical opinions on the worker's behalf. A network provider must render this care. The Court should reverse the superior court order to the contrary.

RESPECTFULLY SUBMITTED this 6th day of November, 2017.

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COURT OF APPEALS, DIVISION II
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The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Department of Labor & Industries' Reply Brief and this Certificate of Service in the below described manner:

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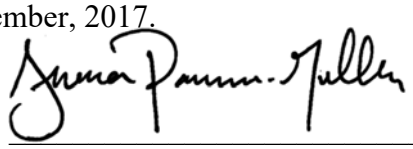

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